

*In the Matter of Farouk Afrasiabi, Supervising Environmental Specialist (Waste Management) (PS9682G), Department of Environmental Protection*

DOP Docket No. 2004-4576

**(Merit System Board, decided August 11, 2004)**

Farouk Afrasiabi, represented by Adam Liebttag, Communications Workers of America (CWA), Local 1034, requests a make-up of the promotional examination for Supervising Environmental Specialist (Waste Management) (PS9682G), Department of Environmental Protection.

By way of background, the subject promotional examination was conducted on April 20, 2004 utilizing the Supervisory Test Battery (STB). The STB utilizes 120 multiple-choice test questions that are presented to candidates on a computer concerning issues, tasks and situations associated with their role as a supervisor in a fictitious organization. Candidates are required to achieve a raw score of at least 56.6 in order to pass the examination with a percentage average score of 70. The appellant, a provisional in the title under test, achieved a raw score of 33.2 and did not pass the examination. A total of 12 employees filed for the subject examination that resulted in an employment roster of 9 eligibles with an expiration date of May 19, 2006. It is noted that one permanent appointment has been made from the subject list and there is an outstanding certification pending against the appellant's position.

On appeal, the appellant argues that he did not receive adequate notice of the scheduled examination date or other necessary information from the Department of Personnel (DOP) and was therefore unprepared for the examination. The appellant explains that he became aware of the examination only through word of mouth in his office approximately 24 hours prior to the start of the test. Thinking it was more prudent to take the examination rather than risk being denied the opportunity for a make-up, the appellant took the STB and failed to achieve a passing score.

The appellant requests the opportunity to take a make-up examination based on the merits of his appeal and equitable consideration of extenuating circumstances leading to his acceptance of his provisional position. Specifically, the appellant states that he responded to an internal Notice of Vacancy for the subject title in May 2003 and accepted an offer of provisional appointment in the Southern Field Office, located in Camden, effective July 2003. At the time of the interview process, the appellant had worked in the Northern Field Office in Parsippany for 14 years and the promotional opportunity required him to relocate to South Jersey. After accepting the provisional position in July 2003, the appellant commuted 260 miles

roundtrip each day to work while preparing his house in North Jersey for sale and building a new home in South Jersey. In October 2003, the appellant maintains that he informed his local post office of a forwarding address, sold his home, and moved to a hotel in Mount Laurel. In November 2003, the appellant filed an application for the subject promotional examination and indicated his mailing address as the hotel in which he was staying. Subsequently, in February 2004, the appellant reports that he moved from the hotel to his new home in Sicklerville, again establishing his correct forwarding address with the local post office. Throughout this entire period, the appellant states that he continued to receive mail, including correspondence from the State, without a problem, but maintains that he never received any correspondence from the DOP notifying him of the examination. The appellant provides a notarized statement in support of his contentions.

The appellant explains that he became aware of the examination late in the afternoon on April 19, 2004, one day prior to the examination, when his Bureau Chief mentioned that he was taking an examination and asked the appellant if he was scheduled for the same day. The appellant states that he was shocked since he had no idea that the test was being administered the following day and ultimately obtained more information about the time and place of the examination. Although he had just learned that the examination was one day away, acting in good faith, he appeared for the examination. He reasoned that gaining approval for a make-up examination would be difficult and he was aware of the examination, although only for a matter of hours, prior to its start time. Therefore, he took the examination.

Under these circumstances, the appellant asserts that he was clearly disadvantaged by inadequate notice of the examination. He argues that other candidates had the benefit of knowing when the examination was scheduled, which allowed them to study the recommended reading materials and to mentally prepare for the test. Further, the appellant states that although information about the STB and the list of recommended reading materials are listed on the DOP's website, every other eligible received prior notice of the examination date and knew their timeline for preparation. Moreover, he states that aside from the usual stress and anxiety associated with taking tests, provisional appointees face the stress of performing well enough to maintain their appointment or risk losing status and pay. Additionally, the appellant contends that some test takers respond better to the computerized format of the STB and that many employees have not been required to take a formal examination for many years, having been evaluated for promotion based on their education and experience. Thus, he maintains that he was at a heightened disadvantage when he took the test.

The appellant also requests that the Merit System Board uphold his appeal on equitable grounds, given that he took on the burden of relocating his home over 100 miles from his previous home to accept this promotional opportunity. He states that acceptance of this position was predicated on an understanding that he would have a fair chance to compete through the examination process. However, although he attempted in good faith to participate in the examination despite these disadvantages, the appellant maintains that he did not have a fair chance due to an administrative error beyond his control which will mandate loss of his provisional title and a demotion.<sup>1</sup>

As a remedy, the appellant requests a make-up examination and that his new score from the make-up be utilized in the certification process. He states that given that a new version of the STB is now available, he would not be exposed to the same test material twice. Moreover, the appellant states that employees are allowed to take the STB twice within one year to improve their score for use on promotional lists.

Michael R. Hastry, Chief, Bureau of Hazardous Waste Compliance and Enforcement, submits a letter in support of this appeal. Mr. Hastry states that the appellant was offered the provisional position in the Camden Field Office based on his education, knowledge, experience, and dedication to his job. Since assuming the position in July 2003, Mr. Hastry reports that the appellant has exceeded inspection estimates and the productivity of the office has increased dramatically. Given the appellant's excellent performance in a provisional capacity, Mr. Hastry reports that it is not in the best interest of the Bureau to have the appellant step down. Moreover, Mr. Hastry notes that throughout the appellant's relocations, he notified the DEP's personnel staff and the benefits group of his address changes, but incorrectly assumed that these groups would advise the DOP of his new address.

## CONCLUSION

In the matter at hand, the appellant vehemently argues that he did not receive adequate notice of the examination date or other necessary information from the DOP and was therefore unprepared for the subject examination. At the outset, a review of the record demonstrates that the "Notification to Appear for Examination" notices were mailed to all candidates for the Supervising Environmental Specialist (Waste Management) (PS9682G) examination on March 25, 2004, 26 days prior to

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<sup>1</sup> If the appellant is displaced by an eligible on the Supervising Environmental Specialist (Waste Management) (PS9682G) eligible list, this action would not constitute a "demotion" as defined by Merit System rules. See *N.J.A.C. 4A:1-1.3*. Rather, he would be returned to his permanent title since he had failed the examination.

the examination scheduled for April 20, 2004. This notification was mailed to the address that the appellant indicated on his application, which was Candlewood Suites, 4000 Crawford Place, Rm. #113, Mt. Laurel, New Jersey 08054. Further, the postal service attempted to deliver the notification to the address provided, but it was returned to the DOP with the notation “Attempted Not Known.” As such, it is clear that the appellant did not receive the notification that was issued to his address on record with the DOP. However, the record also demonstrates that the appellant updated his address with the DOP on April 28, 2004, eight days after the administration of the examination. Although the appellant argues that the gravamen of this case is the issue of adequate notice necessary for a candidate to participate in the examination process, an equally important issue involves the responsibilities required of test takers, particularly provisional incumbents, given that the DOP can only provide timely and accurate notice based on the information it receives from candidates.

The “Application for Promotional Examination” that the appellant completed in order to participate in the subject examination is utilized for all State service promotional examinations. The instructions at the top of the first page clearly note in bold lettering, **“If you change your address, you must notify the Department of Personnel immediately in writing.”** Further, the DOP website provides specific guidance to candidates regarding what to do in the event of an address change after they file an application in the Frequently Asked Questions (FAQ’s) section. In that section, all candidates are advised that they must notify DOP in writing immediately if they change their name or mailing address, or if it is listed incorrectly on a notice that they receive from DOP. Additionally, to ensure that candidate records are updated correctly, a candidate should include the following in a request for change: candidate’s name; social security number or, if assigned a unique number for the examination process, that number; new mailing address, including zip code; the municipality in which the candidate actually lives, if it is different from the mailing address; daytime telephone number; e-mail address, if available; and the effective date of the change. The mailing address of the DOP’s Information Center is also provided.<sup>2</sup> As such, it is evident that applicants are provided clear notice that the DOP must be immediately notified in writing in the event their address changes.

Moreover, the Board has addressed the issue of candidates who provide notification to their Human Resources Office, but not to the DOP in *In the Matter of Estefania Oblea* (MSB, decided January 15, 2003). In *Oblea*, the appellant argued that she received her notification to appear for an examination six months after the test was given because it was sent to her

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<sup>2</sup> In addition, the DOP’s new website also provides candidates the ability to e-mail a change of address to the DOP.

previous home address and that she had updated her address with her personnel office and assumed that her updated information would be forwarded to the DOP. The appellant in that case even provided the forms she submitted to her departmental personnel office and argued that she had in fact updated her mailing address. The Board determined that even though the appellant submitted her change of address information to her personnel office with the Department of Labor, she had not filed the necessary change of address information with the DOP as she was informed. Thus, given the complete employment rosters for one of the examinations for which that appellant was competing, no remedy could be fashioned in equity.

According to the appellant's submissions, he moved from the hotel that he indicated on his application to his new home in Sicklerville in February 2004 and established the correct forwarding address with the local post office. Notwithstanding his statement to the contrary, the postal service returned the notification that the DOP issued on March 25, 2004, noting that the attempted addressee was not known.<sup>3</sup> As such, given that the appellant moved at some unspecified date in February 2004 to his new address, he was obligated to update his mailing address with the DOP at some point in February 2004. All of the information provided by the DOP clearly advised candidates of the importance of doing so. Thus, because the appellant did not establish his new mailing address with the DOP, his notification for the examination was mailed to the address he provided on his application.

Clearly, the DOP had no way of knowing the appellant would have intended his mail to be delivered elsewhere. Even though his notice was returned undelivered, this does not impute a duty on the DOP to seek out a candidate's proper mailing address. The administrative burden of attempting to do this would be unmanageable. Thus, such responsibility can only rest with the candidate. Specific to this case, given that appellant sold his home, lived in a hotel for four months, and built a new home far away in order to take a provisional position, the importance of knowing when that test would be scheduled was clearly paramount. However, given the unambiguous instructions provided on the application and on the webpage, the fact that he updated his address with his personnel staff and the benefits group under the assumption that they would transmit his new address to the DOP is unpersuasive. Further, the responsibility for ensuring one's mailing address is accurate, especially in a situation like the appellant's, can only logically rest with the candidate.

The Board also notes that the promotional announcement for the subject examination, issued on November 1, 2003, clearly advised candidates

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<sup>3</sup> A review of the record demonstrates that the mailing address on the notice and that provided by the appellant on his promotional application are identical.

that the STB, a computer administered examination, may be utilized to test for the symbol, and that information about the test could be found on the DOP's website. The information on the website provides background material regarding the examination, State titles that are tested utilizing the STB, and a recommended reading list. Thus, the appellant had notice as of November 2003 of the test mode that would be utilized for the examination to which he applied. More troubling in this case is the fact that the appellant participated in the examination at issue. It has been well settled in test administration appeals that extraneous variables over which the DOP has no control, such as candidate fatigue or anxiety, may influence test performance. However, it is difficult to fashion a remedy for such occurrences since it is each candidate's responsibility to insure that he or she is prepared for testing. See *In the Matter of Charles Hargrove* (Commissioner of Personnel, decided March 26, 1997). Given that the appellant made the decision to participate in the examination, a make-up is not the issue. Rather, the issue is should he be given another opportunity to take the examination.

The appellant additionally requests equitable consideration based on the circumstances surrounding his relocation and his selection as the provisional appointee to the title under test. The Board recognizes that a number of factors are utilized to make employment decisions by an appointing authority and employment decisions are not solely based on an individual's score on a promotional examination. Merit System rules and procedures contemplate appointing authority discretion in the selection process through the "rule of three." See *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3. Additionally, appointing authorities are not precluded by Merit System law or rules from considering additional experience and education in the interview process in order to select the most qualified candidate. Nevertheless, the benchmark of Merit System law and rules requires that candidates take and pass a competitive examination in order to be considered for employment opportunities, notwithstanding the qualifications of a particular individual.

*N.J.A.C.* 4A:4-2.2 provides considerable discretion to the Department of Personnel in the determination of appropriate test modes. In this case, it was determined that the STB was the best mode for this examination because the STB is designed to evaluate common supervisory skills in the SME-approved supervisory titles. The appellant participated in this examination and did not achieve a passing score. Although it is unfortunate given the circumstances presented, equitable relief is not possible in this case because several other interested candidates passed the examination and the employment roster is complete. Further, there is no basis for equitable relief given that an error by the DOP is not evident, as the appellant did not properly update his mailing address in February 2004 when he moved nor

did he attempt to request a make-up examination prior to participating in the STB. As noted earlier, the notifications were sent by the DOP to all candidates late in March 2004. Given that the STB is the sole selection instrument utilized for supervisory level titles, under the re-test policy, the earliest he could participate in another STB would be late April 2005, assuming he applies for and is determined eligible for a subsequent supervisory announcement.

## **ORDER**

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.